

# The corporate governance officer as a transformed role of the company secretary: An international comparison \*

## Abstract

There is a need to introduce a corporate governance officer to reinforce governance norms in the listed companies. The English company secretary has been performing such a role and can be transformed into a corporate governance officer. Many Asian countries have also adopted the company secretary model to improve corporate governance. Yet there is no common framework about the role. This article discusses how the English company secretary can be transformed into a corporate governance officer and how governance synergies can be created if the Asian countries also adopt this model and the framework in which such a model operates. This article also discusses areas where the law can be clarified and the framework improved to increase the powers and accountability of the corporate governance officer. These include the independence of the corporate governance officer, the role of the professional services firms, and confidentiality protection given to the corporate governance officer to increase transnational governance synergies.

**Keywords:** company secretary; corporate governance officer; transparency; board independence; transnational governance

## Introduction

Corporate scandals around the global markets have prompted regulatory agencies to re-think the role of governance professionals and their relationship with the companies. The emerging markets in Asia, including China, the world's second largest economy, have also recognised that corporate governance professionals can not only reinforce regulatory norms to sustain their capital markets but also bring value to the companies. There is a need to have a corporate governance officer in listed companies to increase the level of corporate governance enforcement. In this article, the author will discuss how the English company secretary can be transformed into a corporate governance officer and how this new role and the proposed way in which it may operate, if adopted by other jurisdictions, can also create transnational governance synergies.

The company secretary is an English corporate invention and the office has continued to this day to enhance transparency and facilitate board independence. The removal of the requirement to appoint a company secretary to a private company by the Companies Act 2006 creates an opportunity to have a sharper focus on this 108-year-old corporate office with increased corporate

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governance duties.<sup>1</sup> This English invention has at first only been exported to other common law jurisdictions such as Hong Kong and Singapore. However, China, as a civil law country, transplanted such a statutory officer in its company structure since 1993. In 2016, Taiwan also introduced a law requiring all listed companies to have a company secretary. Despite the legal installation of this office, the company secretary's function as a corporate gatekeeper has not been discussed as extensively as that of other gatekeepers such as auditors, compliance officers and lawyers,<sup>2</sup> either in the UK or at any transnational level such as in the EU or OECD.<sup>3</sup> The aim of this paper is to explore how a company secretary, as a corporate professional and a corporate governance officer,<sup>4</sup> can perform an oversight function to increase the quality of governance.

This paper will argue that a company secretary can act as a corporate gatekeeper who is in charge of facilitating investor-led corporate governance built on transparency and board independence. Independence is an essential quality which must be regulated. This role can be fulfilled by professional services firms that have been providing corporate gatekeeper services since the advent of capital markets. Thus the issue of whether a company secretary should be classified as an internal person or an outsider is not important. Since the UK, US, and many Asian countries, especially China, have all introduced the office of company secretary, some common ground can be identified to create governance space<sup>5</sup> and synergies. Therefore, at the transnational level, company secretaries of multinational companies have the potential to shape new transnational governance since they manage increasing numbers of joint law enforcement actions. EU and other transnational regulators should not overlook the ability of this corporate governance officer to close gaps in governance, by acting as a corporate gatekeeper along with regulators and other corporate professionals.

There are four sections to this paper. Section I examines the evolving role of the company secretary from a mere servant to a corporate governance officer, and how this office, in parallel with other governance professionals such as auditors and lawyers, continues to evolve in an investor-led corporate ecosystem where transparency and board independence are the main factors for investment

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<sup>1</sup> CA2006, s 270. Although the background thinking is under the motto of 'think small first' to reduce red tape for small companies, it has the effect of placing more emphasis on the public companies' governance. See DTI Company Law Reform White Paper (2005), section 4.

<sup>2</sup> In some countries, public regulators also perform a significant role as corporate gatekeeper. In this sense, corporate professionals are the private corporate gatekeepers: see David Freeman Engstrom 'Agencies as litigation gatekeepers' (2013) 123(3) Yale Law Journal 616 and Julia Black 'Entrolling actors in regulatory systems: examples from UK financial services regulation' (2003) Public Law 63-91.

<sup>3</sup> Ireland has such a role. Many US (ie Delaware and New York) and Australian states also require companies to have a company secretary.

<sup>4</sup> Other corporate professionals are auditors, corporate lawyers, and compliance officers. J Coffee *Gatekeepers. The role of the professions in corporate governance* (OUP Oxford 2006). R Kraakman 'Gatekeepers: The anatomy of a third-party enforcement strategy' (1986) 2 Journal of Law Economics and Organization 53-104; Dalvinder Singh 'Role of external auditors in bank supervision: A supervisory gatekeeper' (2013) 47(1) The International Lawyer 65-98.

<sup>5</sup> Terry McNulty and Abigail Stewart 'Developing the Governance Space: A study of the role and potential of the company secretary in and around the Board of Directors' (2015) vol 36(4) Organisational Studies 513-535.

decisions. Section II considers whether company secretaries should also be independent officers equivalent to auditors, lawyers, and compliance officers. And if so, how such independence can be regulated to best promote corporate values. Section III discusses how professional services firms who are outsiders to the companies can play a role in adding value to the internal governance. Also how independence can be maintained in the face of market competition, especially for those firms who provide multiple corporate services. It will also discuss the rarely explored area of firms' attributed liability - the way in which a company secretary's liability as an internal corporate officer may be attributable to the professional services firms. It will identify any areas that need particular legislative attention in order to avoid any confusion in the interpretation of the current law. The discussion will also provide a model for other countries. Section IV uses multinational companies as a case study to explore the role of the company secretary in the transnational context, and how governance synergies may result. Finally, conclusions will be drawn.

## **Section I The evolving role of the company secretary**

### ***Historical development***

How has the role of the company secretary, although an internal corporate officer, evolved with investor-led governance? The role is now comparable to other corporate professionals in charge of corporate gatekeeping but the company secretary was initially an officer of the company who has served an important role in the administration and management of the company's affairs.<sup>6</sup> The role has changed from being a mere servant of the company to become a statutory officer who takes on managerial functions such as chief of staff to the chairman or adviser to the board. The role of company secretary has a shorter history than that of corporate auditor - another corporate gatekeeper. The UK did not include the company secretary in the Companies Act 1855 where the principle of limited liability was first introduced.<sup>7</sup> In *Barnett, Hoares and Co v South London Tramways Co*,<sup>8</sup> immediately after the principle of limited liability was introduced in that Act, Lord Esher M.R. said 'A secretary is a mere servant; his position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all...'. While Lord Esher was dealing with an issue of corporate authority, it is important to note that there was no legal requirement in 1887 to have a company secretary which is why Lord Esher thought that this non-statutory role was a mere servant. The company secretary did not receive an official title until the early 1900s when British stock exchanges were becoming more international and offered British companies' shares abroad.<sup>9</sup> The Companies Act 1908 then required each company to appoint a company secretary, while the Companies Act 1929 subsequently prescribed the duties and responsibilities of the office. The creation of such a statutory corporate officer has eventually led to judicial recognition of the company

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<sup>6</sup> *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711 (CA).

<sup>7</sup> Companies Act 1855, s 1.

<sup>8</sup> (1887) 18 Q.E.D. 815

<sup>9</sup> Ranald Michie *The London Stock Exchange: A history* (OUP Oxford 1998) 70-142.

secretary with the authority, usually only conferred on directors, to bind the company with third parties. In *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd*,<sup>10</sup> the court recognised the company secretary as an officer of the company who had authority to bind the company with third parties. In the same case, Salmon LJ described a company secretary as the chief administrative officer of the company but left open the question whether he would have any authority in relation to the commercial management of the company. Since then, the emphasis on the function of the company secretary has shifted to legal compliance.

### ***Modern function to maintain corporate transparency and board independence***

Nowadays, capital markets require two critical confidence-building measures for financial participation of the investor: transparency<sup>11</sup> and board independence.<sup>12</sup> The demand for transparency has led to the development of laws and regulations requiring disclosure through filing with various agencies and timely announcements through recognised channels.<sup>13</sup> Board independence has called for increasing numbers of non-executive directors on a board to act as checks and balances in corporate administration. The traditional role of the company secretary to act as the company's chief administrative officer for filing documents with the Registrar of Companies House continues today. The increasing requirement to disclose corporate information through document filings and timely announcements has made this administrative office indispensable for a company's operations in a rule-based market economy.<sup>14</sup> The role of the company secretary in the UK has thus gained greater importance than

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<sup>10</sup> *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711 (CA).

<sup>11</sup> L. Lowenstein 'Financial Transparency and Corporate Governance: You Manage What You Measure' (1996) 96 Colum. L. Rev. 1335, 1361–1362; R. La Porta, F. Lopez-de-Silanes, A. Shleifer and Robert Vishny, "Legal Determinants of External Finance" (1997) 52 J. Fin. 1131; R. La Porta, F. Lopez-de-Silanes, A. Shleifer and R. Vishny, "Investor Protection and Corporate Valuation" (2002) 62 J. Fin. 1147.

<sup>12</sup> MJ Jensen & WH Meckling 'Theory of the firm: Managerial behavior, agency costs, and ownership structure' (1976) 3 Journal of Financial Economics, 305–360; D Higgs Review of the role and effectiveness of non-executive directors (2003) London: DTI; KG Corley 'Examining the non-executive director's role from a non-agency theory perspective: Implications arising from the Higgs Report' (2005) 16 British Journal of Management, 1–4; EU Commission On the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board. Commission recommendation, 2005/162/EC; J Gordon 'The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices' (2007) 59 Stanford Law Review, 1465–1568.

<sup>13</sup> For instance, the Regulatory News Service (RNS) of the London Stock Exchange <http://www.londonstockexchange.com/products-and-services/rns/about/rns-remove.htm>

<sup>14</sup> The Modern Slavery Act 2015 requires certain larger organisations (wherever incorporated) supplying goods or services and carrying on business in the UK to publish a slavery and human trafficking statement ('MSA statement') each year, describing steps taken (if any) during the previous year to ensure that slavery and human trafficking are not occurring in its global supply chain. At the EU level, the Directive 2014/95/EU on the disclosure of non-financial and diversity information (NFR Directive) requires certain large companies to disclose information on policies, risks and outcomes as regards environmental matters, social and employee aspects, respect for human rights, anti-corruption and bribery issues, and diversity in their board of directors.

was originally intended, especially in listed companies which need to comply with law and policy to mitigate exposure to legal and reputational risk. This increased responsibility was not a result of the direct duties imposed on the office by the law, or by providing it with more direct legal powers to be exercised against other officers of the company. The driving force for the increased importance of the company secretary has been the developments in the law requiring greater transparency and more precise governance through internal checks and balances. These include splitting the roles of chairman and CEO, increased number of non-executive directors and the demand for greater corporate social responsibility that is now required by law, and policy compliance throughout corporate groups.<sup>15</sup>

### ***The company secretary and board independence***

The UK Corporate Governance Code, a soft law operating on the basis of ‘comply or explain’,<sup>16</sup> epitomises a de-legalised approach that enhances the role of the company secretary in the facilitation of board independence.<sup>17</sup> Since independent directors play a constantly increasing role in corporate governance,<sup>18</sup> through his close involvement with the board by attending board and other committee meetings, the company secretary is able to act as an interface between the board and shareholder meetings – between, for example, a senior independent director and the minority shareholders. In an increasingly devolved governance system where independent committees carry out functions with the primary aim of removing directors’ conflicts of interest, the company secretary can deliver confidence to investors by acting as an interface between the committee and the chairman (an independent role). For instance, risks identified in committee meetings can be fed to the chairman through the company secretary, who normally prepares the committee meetings.<sup>19</sup>

Services provided by company secretaries can enhance the effectiveness of independent directors in the governance system.<sup>20</sup> Assisting the non-executive chairman in the selection and appointment of non-executive directors and providing an induction and training programme to new directors,<sup>21</sup> giving advice

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<sup>15</sup> S Idowu ‘Corporate social responsibility from the perspective of corporate secretaries’ in S Idowu and W Filho (eds) *Professionals’ perspectives of CSR* (Springer Verlag Berlin Heidelberg 2009) 49-70.

<sup>16</sup> UK Corporate Governance Code 2016 (CG Code), 4; However, it is binding on the premium listed companies on the London Stock of Exchange.

<sup>17</sup> K Keasey, H Short, & M Wright ‘The development of corporate governance codes in the UK’ In K. Keasey, S. Thompson, & M. Wright (Eds.), *Corporate governance: Accountability, enterprise and international comparisons* (2005 John Wiley & Sons: Chichester) 21–42; Hong Kong, Singapore, Taiwan and Japan all adopt a similar non-statutory code of corporate governance.

<sup>18</sup> Derek Higgs, ‘*Review of the role and effectiveness of non-executive directors*’ January 2003.

<sup>19</sup> The secretary tends to serve a longer term than the board directors; and can thus offer a historical view, in the tradition of the company, to both the board and investors.

<sup>20</sup> Principle A.5.3 of the CG Code states that a company secretary should be ‘responsible to the board for ensuring that board procedures are complied with.’

<sup>21</sup> ICSA Guidance on induction of directors, Guidance Notes June 2012.

<https://www.icsa.org.uk/assets/files/pdfs/guidance/Guidance%20notes%202012/Induction%20of%20directors.pdf>

to non-executive directors, and assisting the non-executive chairman in conducting board evaluation (a regulatory requirement under the Corporate Governance Code for listed companies) brings confidence to the investors, especially retail investors.<sup>22</sup> These responsibilities may increase investor confidence, which reduces the cost of raising capital.<sup>23</sup> The reduction of cost of capital results in value-creation to companies.<sup>24</sup> These examples show how the non-statutory Code can act as a catalyst for providing valuable corporate secretarial services to companies that benefit both investors and stakeholders. Hong Kong and Singapore have adopted similar codes for listed companies.<sup>25</sup> Taiwan and China also regulate the company secretary, but not through statutory company law. There are more practical reasons for developing such an office through non-statutory rules and this will be discussed in later sections of this paper.

### ***Focus on listed companies through Codes of Best Practice***

While the 2006 Companies Act in the UK removed the requirement for private companies to appoint a company secretary and allowed them to decide whether or not the position is required according to their own constitution, public companies are still required to make such an appointment.<sup>26</sup> This is similar to the approach adopted in China and Taiwan,<sup>27</sup> who consider that a governance officer is necessary for companies who are raising capital from the public. Hence, their codes of best practice, which are similar to the UK's Corporate Governance Code, play a more important role than statutory company law. Since private companies, and to some extent public companies, do not raise capital from the public, corporate governance for them may have a different objective.<sup>28</sup> To

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<sup>22</sup> The Code, as will be recalled, is a soft-law mechanism operating on the basis of 'comply or explain'.

<sup>23</sup> Romilda Mazzotta & Stefania Veltri 'The relationship between corporate governance and the cost of equity capital. Evidence from the Italian stock exchange', (2014) 18 Journal of Management Governance 419-448; K Chen, Z. Chen, and K Wei 'Legal protection of investors, corporate governance, and the cost of equity capital' (2009) 15 Journal of Corporate Finance 273-89.

<sup>24</sup> Regarding one of the causes of the 2007-09 financial meltdown, it has been stated that "Sometimes what the directors of financial institutions were being asked to consider was just so complicated that a lot of the non-execs didn't understand what was being suggested, and then it became difficult for them to question anything." This was a statement of Lorraine Young, a company secretary, made to the Gateway <http://thegatewayonline.com/corporates/types-of-work/icsa-in-good-company>

In such situations, the company secretary can act as a filter to review the relevant documents and determine whether the right types of information have been provided to the directors who, by definition, are not involved with the company on a daily basis.

<sup>25</sup> Code of Corporate Governance, Singapore; Code on Corporate Governance Practices, Hong Kong.

<sup>26</sup> CA 2006, s 270; If the listed company is a private company, it is required to have a company secretary under the CG Code. If it is public company, CA2006 requires a company secretary to be appointed. In Singapore, a company secretary is required statutorily under s 171 of the Companies Act for both public and private companies.

<sup>27</sup> Shanghai Stock Exchange Listing Rules 2012; Shenzhen Stock Exchange Listing Rules 2012; Taiwan Stock Exchange Corporate Governance Best Practice Principles 2016.

<sup>28</sup> The UK's change in this requirement for private companies was due to the streamlining of private companies' administrative burdens included in the law, resulting in fewer filing and

discuss the role of the company secretary in other jurisdictions, especially in non-common law countries, and to find common ground for developing codes of best governance practice, it is therefore sensible to focus on listed companies. Board independence is less of an issue for private companies and non-listed public companies; hence, the Corporate Governance Code does not apply to private or non-listed public companies because policy compliance to mitigate exposure to reputational damage primarily concerns listed companies.

Many private companies do not operate in jurisdictions outside their home country through subsidiary operations, so have less concern for subsidiary governance.<sup>29</sup> Furthermore, what amounts to a private company or a public company in non-common law jurisdictions such as China and Taiwan may not be comparable to the position in the UK, Singapore, and Hong Kong. For these reasons, the discussion here focuses on how a company secretary brings value to listed companies and how that role can be transformed into a corporate governance officer.<sup>30</sup> As it happens, company regulators do not develop the rules on the role of the company secretary for listed companies in any of the jurisdictions discussed here. In the UK, the Financial Reporting Council develops the rules, rather than the the Department for Business, Energy and Industrial Strategy (BEIS). In Taiwan, the Securities and Futures Commission promulgates the rules on the company secretary rather than the Ministry of Economic Affairs. In Singapore, it is the Monetary Authority of Singapore rather than the Accounting and Corporate Regulatory Authority (ACRA). In China, it is the China Securities and Regulatory Commission (CSRC) rather than the State Administration for Industry and Commerce (SAIC). In Hong Kong, it is the Stock Exchange of Hong Kong Limited (SEHK). These regulators focus on listed companies, hence common approaches can be more easily adopted.

## **Section II The Company secretary as an independent gatekeeper**

### ***Attribute of independence***

If company secretaries are to fulfil the role of corporate governance officer with responsibility for the requirement for corporate transparency and facilitating board independence, they should retain the critical attribute of independence, as do other gatekeepers such as auditors, lawyers, and compliance officers. However, this attribute of independence should be regulated in order to best realise governance goals. They should be independent when exercising their professional judgment, just as lawyers, auditors and other governance professionals do. They should be independent in terms of their relationships

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reporting requirements for private companies. See David Milman 'The regulation of private companies in UK law: current policy developments and recent judicial rulings' (2009) 257 Company Law Newsletter 1-4.

<sup>29</sup> Some private companies are holding companies with subsidiaries operating abroad. However, most large multinational companies are public companies.

<sup>30</sup> Private companies can determine in their own constitutions whether to utilise such an office in delivering its organisational objectives. According to Companies House statistics, the number of companies incorporated without a company secretary since 6 April 2008 has increased greatly.

with the companies and members of the board, just as an independent director is.

### ***Compliance officer a like in exercising independent judgment***

As mentioned, transparency is an indispensable element of modern corporate governance, and transparency has been translated into various requirements for filing, reporting of law and policy compliance, and timely announcements. Company directors and company secretaries, as officers of the company, assume filing duties under various laws. These filing, reporting and announcing requirements involve independent judgment to be exercised. For instance, complying with accounting rules,<sup>31</sup> complying with rules specifically designed to protect the shareholders ie the pre-emptive rights regime,<sup>32</sup> understanding the operations of nominee companies to identify rightful investors,<sup>33</sup> the application of proxy rules to increase shareholder engagement,<sup>34</sup> and the proactive development of governance protocol to hedge risks stemming from subsidiary operations,<sup>35</sup> all demand a skilled governance officer. In future, companies may be required to make disclosures under the freedom of information law if they carry out work that is categorised as public service.<sup>36</sup> Hence, independent judgment would be needed to determine issues concerning disclosure requirements.

Furthermore, there are other regulations aiming at removing directors' conflicts of interest and preventing directors' self-dealing. The duty of enforcing these regulations internally falls on the company secretary who shields the company from insider misconduct. Under the UK Financial Services and Markets Act 2000,<sup>37</sup> the company secretary also has a role in implementing and communicating procedures for listed company directors to comply with the

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<sup>31</sup> Company secretaries must ensure that companies' account records are prepared in the form required by company law and accounting standards. Corporate governance structures also affect the accounting decisions. See Tamer Elshandidy & Ahmed Hassanein 'Do IFRS and board of directors' independence affect accounting conservatism?' (2014)24(16) *Applied Financial Economics*, 1091-1102.

<sup>32</sup> Chapter 3 of CA 2006 on shareholders' rights on preemption.

<sup>33</sup> For the policy discussion on indirect investors' enforcement of corporate governance see RC Nolan 'Indirect Investors: A Greater Say in the Company?' (2003) 3(1) *Journal of Corporate Law Studies*, 73-121.

<sup>34</sup> Tsjalle van der Burg and Aloys Prinz 'Empowering small shareholders: a comparison of three instruments' (2006)14(5) *Corporate Governance* 406-417; Paolo Santella, Enrico Baffi, Carlo Drago, & Dino Lattuca 'Legal obstacles to institutional investor activism in the EU and in the US' (2012) vol 23(2) *European Business Law Review* 257-307.

<sup>35</sup> Geoffrey C. Kiel, Kevin Hendry and Gavin J. Nicholson 'Corporate governance options for the local subsidiaries of multinational enterprises' (2006) vol 14(6) *Corporate Governance* 568-579; In March 2017, the OECD also released 'Responsible Business Conduct for Institutional Investors' to help institutional investors implement the due diligence recommendations of the OECD Guidelines for Multinational Enterprises in order to prevent or address adverse impacts related to human and labour rights, the environment, and corruption in their investment portfolios.

<sup>36</sup> Simone Mezzacapo 'The right of access to public bodies' records in Italy and UK "Actio Ad Exhibendum" and freedom of information risks and opportunities for private sector companies' (2006)17 (4) *European Business Law Review* 959-979.

<sup>37</sup> S 96B, The Financial Services and Markets Act 2000.



Model Code on share dealing. To prevent insider dealing by directors,<sup>38</sup> prior reporting and obtaining clearance from a non-executive director should pass through the company secretary so that a record can be kept of any communication.

In some companies, company secretaries act also as a gatekeeper to prevent illegal political donations.<sup>39</sup> The UK Companies Act 2006 prohibits political donations by UK registered companies and subsidiaries of ultimate UK holding companies, unless they are authorised by shareholder resolutions in a general meeting.<sup>40</sup> The company secretary needs to be familiar with the operations of subsidiary companies both at home and abroad<sup>41</sup> in order to design an effective reporting line so that shareholder resolutions can be obtained in a timely manner<sup>42</sup> and meet disclosure requirements.<sup>43</sup> For example, one large multi-national group requires group companies to return a certificate to the secretary of the holding company each year, stating either that no payment has been made or providing details when a payment has taken place. The company secretary is the 'go to' person who oversees reporting duties for subsidiaries. These results are then reported annually to the audit committee of the company as well as in an interim report to the committee of independent directors.<sup>44</sup> This system can be implemented either through an internal corporate governance protocol or the subsidiary companies' constitutions.

### ***Chief of staff to the independent chairman***

For listed companies, investor confidence is increased by the company secretary's role of enhancing the monitoring and advisory functions of non-executive directors, in a similar way to the greater independence of directors.<sup>45</sup> To whom a company secretary reports will influence the quality of independence of the company secretary. There is no common approach among the jurisdictions discussed here. Hong Kong<sup>46</sup> and Singapore,<sup>47</sup> while largely following the UK Corporate Governance Code, are not clear on whether the company secretary

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<sup>38</sup> S Djankov, R. La Porta, F. Lopez-de-Silanes, and A. Shleifer 'The law and economics of self-dealing' (2008) *Journal of Financial Economics* 430–65.

<sup>39</sup> Jack Davies 'From gentlemanly expectations to regulatory principles: a history of insider dealing in the UK: Part 1' (2015) 36(5) *Company Law* 132-143.

<sup>40</sup> Richard Williams 'Regulating political donations by companies: challenges and misconceptions' (2012) 75(6) *Modern Law Review* 951-980.

<sup>41</sup> Companies Act 2006 Part 14. A holding company is permitted to seek authorisation of donations and expenditure in respect of both the holding company itself and one or more subsidiaries through a single approved resolution.

<sup>42</sup> Companies Act 2006 Part 14 s 366.

<sup>43</sup> Under the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, Directors' reports must disclose any relevant political donations or expenditures. SI 2008/410 7 Schs 3,4, and 5.

<sup>44</sup> This is the current practice of the British American Tobacco group. It requires that any donation must be authorised by the board of the company. Such a donation must be fully documented in the company's books.

<sup>45</sup> Rafel Crespi-Cladera and Bartolomé Pascual-Fuster 'Does the independence of independent directors matter?' (2014) 28(1) *Journal of Corporate Finance* 116-134.

<sup>46</sup> Code on Corporate Governance Practices, Hong Kong.

<sup>47</sup> Code of Corporate Governance, Singapore, Guideline 6.3.

acts as chief of staff to the chairman. Neither the Hong Kong nor Singapore code makes recommendations for independent non-executive chairmen. China only requires the company secretary to be attached to the board. Taiwan does not specify whether such an office should be placed under the executive directors or the independent directors.

In the UK, the office of the company secretary is often established under the non-executive chairman's office - acting as chief of staff to chairman.<sup>48</sup> This coincides with several oversight functions of the chairman - including the responsibility for conducting board evaluation.<sup>49</sup> Company secretary's relational independence, when not working under the control of the executive officers, enhances the functions of the non-executive directors whose major role is to remove the conflicts of interest of the executive directors. Since the auditor or the internal or external lawyers do not necessarily attend board meetings and may not have direct access to the chairman and other non-executive directors, the company secretary has a unique gatekeeping role.

This role has been recognised as long ago as 1993 in the Cadbury Report, which recommended that the company secretary should give guidance to the board on board members' responsibilities. Board members should have access to the company secretary for such guidance and advice. In particular, the chairman, who is responsible for the functioning of the board, should have strong support from the company secretary. The company secretary's attribute of independence would not have been as necessary if board meetings were simply a management discussion forum without the aim of ensuring that checks and balances are in place to support investors' confidence.

Combining the roles of law and policy compliance, the company secretary is in a position to detect insider misconduct through an effective reporting system and can 'whistle-blow' insider misconduct to the chairman.<sup>50</sup>

## **Enforcement of independence**

### ***A statutory duty or a principle-based approach?***

As a gatekeeper and an officer, what kind of duty of independence should a company secretary assume? Should he have the duty to exercise independent judgment as directors do, and if so, how should the quality of independence be maintained? In the jurisdictions discussed, none has imposed a statutory duty to exercise independent judgment on company secretaries as they have done on the directors.

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<sup>48</sup> Caroline Newsholme 'FRC guidance on board effectiveness' (2011) 35(2) Company Secretary's Review 14-15.

<sup>49</sup> OECD, Corporate Governance Principle VI E4; UK Corporate Governance Code Section B.6.

<sup>50</sup> Indira Carr, David Lewis 'Combating corruption through employment law and whistleblower protection' (2010) 39(1) Industrial Law Journal 52-52; Peter Yeoh 'Whistleblowing: motivations, corporate self-regulation, and the law' (2014) 56(6) International Journal of Law & Management 459-474.

There are practical difficulties in imposing statutory duties of independence on company secretaries. As a general duty, UK law requires directors to act independently by exercising unfettered judgment.<sup>51</sup> However, company secretaries do not take business, management, and executive decisions in the way that company directors do. They act, as recommended in some codes of governance,<sup>52</sup> under the direction of the chairman. It is difficult to define the boundary between exercising independent judgment and acting under the direction of the chairman.

Whether such a duty should be legally imposed on company secretaries depends on their functions vis-à-vis the board (whether they also take executive decisions), the organizational objectives (what kind of responsibilities are delegated to them), and corporate governance agenda (whether they have the task to manage a group's compliance programme). The company secretary may act as chief of staff to the non-executive chairman, an adviser to the board, a critical appraiser of board members' roles, a third person in a chairman-CEO relationship, an interface between the board and the shareholders, a gatekeeper for corporate governance. *If these roles are to remain open for organizational innovation, the duty of independence does not need to be legally prescribed.* This approach would allow companies to design the job descriptions freely without being caught out unnecessarily by strict legal rules.<sup>53</sup>

Hence, a code of conduct with a situational approach to the meaning of 'independence' – using the negative criteria as the Corporate Governance Code 2016 does for independent directors - can be issued for defining relational independence.<sup>54</sup> In addition, there can be systems and processes to ensure the quality of independence, notably, on the appointment to, and removal from office.<sup>55</sup> For the requirement to exercise independent judgment, the professional code can provide guidance as the case for lawyers and auditors.<sup>56</sup>

### ***Appointment and removal***

If the company secretary is expected to be a corporate gatekeeper in a similar way as an auditor, the appointment and removal of an auditor could offer an equivalent way of proceeding. Thus, since an individual director cannot unilaterally dismiss an appointed auditor, an individual director should also not

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<sup>51</sup> CA 06 s 173.

<sup>52</sup> The UK Corporate Governance Code and Singapore Code of Corporate Governance.

<sup>53</sup> Principles-based regulation can be considered. See Julia Black, Martyn Hopper & Christa Band 'Making a success of Principles-based regulation' (2007) 1(3) Law and Financial Markets Review 191-206.

<sup>54</sup> The Code of Corporate Governance uses the same situational approach to define when a non-executive director is not independent.

<sup>55</sup> Some lessons can be learnt from auditor's appointment and removal to maintain audit independence. See Reiner Quick 'EC Green Paper proposals and audit quality' (2012) 9(1) Accounting in Europe 17-38.

<sup>56</sup> See auditor's independence in APB Ethical Standard 1 (revised) on integrity, objectivity, and independence (2008), <http://www.frc.org.uk/images/uploaded/documents/ES1%20-%20v5%20clean.pdf>.

be able to remove a company secretary, leaving only the board with the power of appointment or removal. As the law places greater control on the appointment and removal of a company's auditor for greater investor confidence, auditor rotation, the control of auditors' remuneration, control procedures for limiting auditors' liabilities to the company, and shareholder participation in appointment and removal processes all help to ensure auditor independence. Although there is no hard law in the UK with the effect of regulating a company secretary's independence, the UK Corporate Governance Code recommends that only the board should have the ability to appoint and remove a company secretary; an individual director should not be able to do so unilaterally.<sup>57</sup> This is also the approach adopted in Hong Kong, Singapore, Taiwan and China except that there is no clear indication of whether an individual director, acting with delegated powers from the board, can unilaterally dismiss the company secretary. Taiwan further specifies that the nomination committee should participate in the appointment of the company secretary.

### ***Shareholder approval***

Should the shareholders have a say on the appointment and dismissal of their governance officer? A company secretary can be a permanent employee of a company, unlike an auditor (a contractor) or a company director of a listed company, whose term of office is usually based on a service contract of some limited period. Subjecting company secretaries to similar controls could disrupt the administrative operation of companies, including the strict filing and reporting duties required by the law. If the removal and appointment of a company secretary requires shareholder approval at a general meeting,<sup>58</sup> the board will be unable to quickly suspend a company secretary who is found to be in default of compliance with the law or of his or her contractual or other duties to the company. In an interim period, such a company may need to fulfil its filing duties urgently, and convening a meeting to obtain approval of the company's shareholders can cause missed filing deadlines, with a consequent contravention of the law for which directors would be liable.<sup>59</sup>

Some lessons may be learnt from the auditor's model for regulating the independence of the company secretary. Auditors have the right to make representations to the shareholders who vote on the question of their removal.<sup>60</sup> A similar arrangement could be set up for the removal of a company secretary. Prior to the authorisation of their removal, they should be able to make a written or oral representation to the board. Since their removal is not by ordinary resolution, a representation to the general meeting may not be justified. However, a representation to be included in the company's annual can be required by the Corporate Governance Code. This will make the removal process more transparent.

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<sup>57</sup> UK Corporate Governance Code B.5.2.

<sup>58</sup> This is currently required for a removal of the auditor.

<sup>59</sup> CA 2006 s 541.

<sup>60</sup> CA 2006 s 511(3)

Using a soft law approach to regulating the role of company secretary with the emphasis on disclosing company policy as well as setting up formal procedures for appointment and removal would allow independence to be enhanced within the board and the company.

### **Section III The prospects and legal challenges of provisional services firms**

#### ***Justification for outside professional services firms to act***

It is debatable whether a permanent employee (an internal officer) or a contracted professional firm (an external contractor) would better fulfil the role of gatekeeper. An employee company secretary is closer and more integrated into the board and the company than an external consultant. He has closer proximity to the shareholders, hence is in a better position to act as spokesperson for the board in communicating with shareholders. An employee company secretary may hold a longer tenure than executive directors and, having experienced both good and bad times, is also a better repository of corporate memory which is invaluable for providing guidance to a board.<sup>61</sup>

On the other hand, an external person may be more independent from the management and can take a more objective view. In fact, many corporate gatekeeping functions are now being taken up by outside professional firms as contractors who can provide company secretarial services. Some listed companies have long been using professional services firms to fulfil their statutory requirements. This includes the appointment of professional services firms to act as company secretary, outsourcing some part of the work to the firms, or retaining them as back-up support.<sup>62</sup> This is also the case for the countries discussed here, except Taiwan and China.

Unlike Singapore, China, and Taiwan, UK law does not require a company secretary be a full-time employee or an individual person.<sup>63</sup> A body corporate providing secretarial services can be appointed as the company secretary. The benefit of having a corporate company secretary is that it provides flexibility by enabling more than one person to represent the company and also gives access to a more extensive knowledge base. Similarly, a professional firm in the form of a partnership or limited liability partnership (LLP) can also provide such services. Professional services firms can have greater expertise and knowledge in particular areas of governance, such as the listing and compliance requirements for stock exchanges. A company does not need to employ a full-time person to hold the office and can contract the service out to a professional firm to be more cost-effective. If a company needs specialised knowledge - in financial law, for example - a law firm can provide the service. A lawyer can be retained by a company to hold the office of company secretary. Such retainers are generally welcomed by law firms because they allow the law firms to become

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<sup>61</sup> The Company Secretary: Building trust through governance, 2014 ICSA <https://www.icsa.org.uk/products-and-services/knowledge-and-guidance/research/the-company-secretary-report>

<sup>62</sup> This is the case especially at times of peak company secretarial activity e.g. year-end/AGM.

<sup>63</sup> Hong Kong also allows a body corporate to act as a company secretary.

familiar with the company and to forge a good business relationship with it.<sup>64</sup> In such cases, the company is free to design its own job description, and the professional services firm can provide tailor-made secretarial services. Market competition between firms allows companies to obtain cost-effective secretarial services.<sup>65</sup>

### ***Questions of independence and liability***

Two major issues arise. As with audit firms, market competition, a driver thought to deliver innovation, can compromise the element of independence that is critical for the gatekeeping service.<sup>66</sup> The company secretary's independence is fundamental to corporate value creation. However, how can secretarial quality be maintained and enhanced in this respect if the provision of the service is subject to market competition? And also, how should a company secretary's acts and liability be attributed? Does the liability rest with the company or the firm that provides the service, whether a company, an ordinary, or limited liability partnership? Professional services firms, which potentially hold assets,<sup>67</sup> are more likely to become a source of compensation than an individual employee with limited assets. Since April 2005,<sup>68</sup> UK companies can now freely provide indemnities to a secretary as they see fit. If this can apply to professional services firms, controls should be established to ensure that service quality is not unduly compromised.

### ***Maintaining the attribute of independence***

#### *Low-balling issue and disclosure*

Many professional services firms provide a large range of corporate services to companies including audit, management, tax, secretarial and legal services. The issue of auditor independence has been raised when an auditor, acting as an external gatekeeper, plays 'low ball' to gain other non-audit businesses.<sup>69</sup> Such market competition is essential to service innovation, but it can also compromise some of the key requirements for maintaining good corporate governance and creating corporate value. When an independent audit is compromised, market competition fails to deliver value, not only as an engine for innovation but also as an alternative regulatory tool for quality control. None of the countries

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<sup>64</sup> Such a secondment arrangement can provide mutual benefits. See Secondment plan of mutual benefit (1992) 6(47) Lawyer 6.

<sup>65</sup> Christopher Humphrey 'Regulating audit beyond the crisis: A critical discussion of the EU Green Paper' (2011) 20(3) The European Accounting Review 431-457.

<sup>66</sup> K Houghton and C Jubb 'The Market for financial report audits: Regulation of and competition for auditor independence' (2003) 25(3) Law and Policy 299-321.

<sup>67</sup> Companies can provide indemnities to corporate officers i.e. company directors. The auditor can also enter into a damage limitation agreement with the audited company to control their financial if not reputational exposure.

<sup>68</sup> The Companies (Audit, Investigations and Community Enterprise) Act 2004.

<sup>69</sup> Patrick Velte and Carl-Christian Freidank, 'The link between in- and external rotation of the auditor and the quality of financial accounting and external audit' (2015) 40(3) European Journal of Law and Economics 225-246.

investigated here have provided solutions, specifically in the context of the company secretary.

There are many ways to regulate conflicts of interest when a professional services firm is engaged to provide secretarial services. Company secretarial and other management consulting services are more likely to be among the additional business that can be gained from audit 'low-balling' practices. The issue is how to make sure that the secretarial services offered are not 'tagged along' with the audit service. Potential conflicts can be controlled by the company disclosing such a 'tag-along' relationship. Once the tag-along relationship has been disclosed, shareholder approval should be required to further examine potential conflicts and the value provided to the company. Such approval may only be needed for services provided by the professional services firms who offer a full range of services. Furthermore, compulsory rotation, if introduced, would be able to maintain a more arms-length relationship between the company and professional services firms. Rotation can also increase independence since the company secretary will be less attached to the management team, hence fostering a more arms-length relationship. In addition, UK whistle-blower protection law also applies to contractors.<sup>70</sup> This law further strengthens professional services firms' ability to maintain the quality of independence.

#### *Competing clients and a Chinese-wall*

There is a further issue regarding a service firm's liability for conflicts of interest. If, as discussed in the previous section, company secretaries are contracted to provide value-added services such as the appointment of non-executive directors, designing a cost-effective reporting system or a compliance monitoring programme, a professional services firm providing the same secretarial services to competing companies at the same time may give rise to a claim for a conflict of interest. This is because the firms will have access to sensitive commercial information when they attend board meetings and can access information about subsidiaries through the governance protocol or by virtue of the subsidiary's constitution.<sup>71</sup> For a partnership firm, an internal wall created to absolve potential conflicts may be needed. Such a 'Chinese wall' may be more effective for managing the risk of conflicts between, say, the audit and secretarial departments. Whether such a wall can also be effective when raised within the secretarial department is questionable. Would disclosure of the conflicts by the firm and client consent be sufficient to remove the liability? Disclosure by the firm and client consent may remove the conflicts if the secretarial service is purely administrative, but if the work includes more business-oriented services, for instance involvement in the recruitment of non-executive directors, such conflicts are not easily removed. When a law firm is retained to act as company secretary and is tasked with monitoring a corporate compliance programme, this may create a conflict if the firm is also retained by a competing company.

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<sup>70</sup> In the US, whistleblower protection is not given to at-will employees.

<sup>71</sup> Ben Walther 'Bylaw governance' (2014) 20 Fordham Journal of Corporate & Financial Law 399- 459.

The UK is the only country, amongst the discussed jurisdictions, that has dealt with this problem to some extent. Under section 1214(2) of the Companies Act 2006, the auditor of a company cannot also be the company secretary. But this does not completely solve the potential for conflicts of interest. If a company appoints an auditor from a particular services firm, this would not prevent another person from the same services firm from acting as company secretary.

### ***Attribution of professional firms' liabilities***

Clarifying firms' potential liabilities is crucial for assessing the risk to the governance service industry. Since the company secretary is considered to be an officer of the company in all the jurisdictions investigated here, how can their liabilities be attributable to the firms? None of the jurisdictions investigated have a satisfactory model, even for the UK's more advanced service industry. Other than the UK and Hong Kong, all the jurisdictions require the company secretary to be an individual person. The UK and Hong Kong are the only two jurisdictions that allow a body corporate to act. This has raised a number of legal uncertainties which have inhibited other countries from following suit.

The UK Companies Act 2006 imposes criminal liabilities on the company secretary,<sup>72</sup> therefore not having a clear approach to identifying the person to be held accountable would defeat the deterrent effect of the criminal sanctions. For civil liability, identifying the right accountable person affects the remedies to be awarded to injured parties.

### ***Criminal liability***

Secretarial services can be provided by a professional firm, which can be a body corporate (including a limited liability partnership<sup>73</sup>) or a partnership. The law states that it is possible for an officer of the company to be held civilly and criminally liable. When a company engages a partnership firm (i.e. an LLP - a separate legal entity from its members) to provide services, who is the person, in fact and in law, appointed to hold the office of company secretary?

In the UK, a body corporate can be made criminally liable.<sup>74</sup> Yet, there is some confusion in the wording of the provisions under the Companies Act 2006. The Act provides that when a person is an officer of another company, he or she does not commit an offence as an officer in default unless one of the company's officers is in default. The provision can be taken to mean that the company providing the secretarial services, by holding the office of company secretary, cannot be held criminally liable under the Act unless a director of the professional services firm is identified as an officer in default by authorising, permitting, participating in, or failing to take all reasonable steps to prevent the contravention. Nevertheless, a director of a professional services firm may not be

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<sup>72</sup> For instance, CA 2006, s 26(3), s 32(3), s 425, s 451, and Part 36 (Offences under the Companies Acts).

<sup>73</sup> Limited Liability Partnerships Act 2000 s1(2).

<sup>74</sup> Criminal Justice Act 1993 s 52 and Enterprise Act 2002 s 188.



personally involved in the provision of the service, and in that case the director's firm will not be held criminally liable. The current provisions of the Act can make the application of the attribution rules confusing.

When the services firm is a partnership or limited liability partnership, an individual member of that firm will serve as the company secretary and thus, criminal liability is assumed by that individual rather than the firm. However, because a limited liability partnership acquires a separate legal identity, if the company engages the services firm rather than an individual from the firm, a similar question can arise. Neither the Act and nor case law have yet considered such a situation. A clear legal framework on attributing individual behaviour or liability to the entity (or association) of the professional services firms should be introduced.

### *Civil liability*

In terms of civil liability, the company or its shareholders<sup>75</sup> through a derivative claim can pursue compensation claims or a claim to account for profits against the firm and/or the individual from the firm providing the service. Assuming the professional services firm is a body corporate such as a company, claims can be made against the company. If the firm is an entity other than a company, claims in contract or in tort brought to obtain compensation will depend on the organisational form of the firm – whether the individual is liable or all the members of the partnership could be claimed against. If an LLP is retained to act as the company secretary, the contract is between the company and the LLP, which is a body corporate under UK law. An action for damages should be brought against the LLP. There can be an indemnity provision in the contract. Yet, an action in tort can be brought against the individual person providing the service.

Since other countries use different business forms for professional services firms, it may not be easy for develop a common model among them. This also explains why other countries, apart from the UK, have capacity (natural person only) and residence requirements. These requirements remove the risks of being unable to hold an individual accountable and not being able to make claims against firms with limited liability protection.

## **Section IV Transnational governance and combination with the office of general counsel**

### ***Transnational governance and the resulting synergies***

There are a number of jurisdictions that require companies to appoint a company secretary.<sup>76</sup> As multinational companies are becoming the main

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<sup>75</sup> CA 2006 Part II.

<sup>76</sup> Ireland, Australia (only for public companies), New Zealand, Taiwan, Hong Kong, Singapore, China and USA (ie State of Delaware under s 142(a) of the Delaware General Corporation Law).

providers of goods and services, the company secretaries' tasks are to design an effective subsidiary governance framework to mitigate harms and to create governance synergies. These synergies can be delivered in the case of actual or potential joint law enforcement actions against multinational companies. In actual joint law enforcement, company secretaries are the first contact point for responding to regulatory and enforcement enquiries across many jurisdictions. In potential joint law enforcement actions, their role is to ensure that measures, such as a subsidiary governance framework,<sup>77</sup> are in place to prevent enforcement actions or to defer an enforcement action in the case of a deferred enforcement action agreement.<sup>78</sup>

### ***General counsel and company secretary***

Within a multinational company, if the general counsel also serves as company secretary, the legal office can be organised to include the company secretaries of subsidiaries incorporated in different jurisdictions. Many UK companies have combined the offices of company secretary and corporate counsel.<sup>79</sup> Of the FTSE 100 companies surveyed in a census,<sup>80</sup> 70.2% of the company secretaries held a legal qualification.<sup>81</sup> Under a subsidiary governance framework, the subsidiary company secretaries can provide needed information (e.g. a certificate of political donations) to the general counsel of the parent company and can assist the general counsel with implementing procedures as required by law (e.g. an anti-bribery programme) for the subsidiary companies. A governance structure designed to allow the company secretary of the parent company to supervise, through a reporting line, subsidiary companies' secretaries can effectively ensure improved information-sharing across the group organisation.

In increasing joint enforcement by multi-jurisdictional enforcement agencies, a global settlement agreement with a reform programme would be a cost-saving strategy for a defaulting company. This combination of the two offices would make it easier for monitored parent companies to conduct due diligence on other group affiliates.<sup>82</sup> However, a general counsel or a legal officer is not required in the UK and in many other jurisdictions, yet many large companies and multinational companies have general counsel offices or legal departments that manage the company's legal affairs. If a general counsel or legal officer is not a legally required officer within the organisation, this person may not have legal access to, or the power to obtain corporate information. Legally, the general

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<sup>77</sup> Federico Mazzacupa 'Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-Prosecution Agreements in the UK and US Systems of Criminal Justice' (2014) 78 (3) Journal of Criminal Law 249-262.

<sup>78</sup> The company secretary can also be the designated person to monitor a deferred statement programme.

<sup>79</sup> Ian Maurice of Egon Zehnder discusses the relationship between General Counsel and Company Secretary and describes the UK trend to split these roles [http://www.egonzehnder.com/files/the\\_general\\_counsel\\_and\\_the\\_board.pdf](http://www.egonzehnder.com/files/the_general_counsel_and_the_board.pdf)

<sup>80</sup> The census was carried out in 2004 by Equiniti.

<sup>81</sup> Only legally qualified lawyer in Taiwan can serve as a company secretary.

<sup>82</sup> Deborah DeMott 'The Crucial But (potentially) precarious position of the chief compliance officer' (2013) 8 Brookings Journal of Corporate Finance and Compliance Law 57-70.

counsel does not have access to the boardroom, but such access can be gained through becoming the company secretary. Thus, the general counsel may request information from a subsidiary company's in-house counsel who does not have the legal power to access the company's information. However, a company secretary who is an officer of the company would have such power, and obtaining corporate information such as records or sales data would not need to be authorised by the executive directors - to whom the general counsel is affiliated.

UK companies are required to implement internal procedures under various acts to protect the stakeholders of the company and safeguard the interests of the general public. Companies are required to put in place health and safety procedures to protect employees and to implement an anti-corruption system within the organisation, including subsidiary companies incorporated in other jurisdictions. Company secretaries involved in the design and implementation of these procedures who work collaboratively with other company secretaries of the same group under, say, the general counsel's office, would ensure that the norms of the parent company are effectively diffused through the subsidiary companies. These norms can also result in a spillover effect on the business environment surrounding the subsidiary companies. These procedural mechanisms not only create a safe harbour if there is misconduct by an employee or an agent of the company and its subsidiaries, but they may be required by regulators as a condition for a deferred prosecution.<sup>83</sup> Since some of the countries investigated here require the company secretary to operate under the chairman, it is questionable whether the office of a parent company's secretary can give direct instructions to the company secretaries of their subsidiary companies.

### **The problem of wearing two hats**

When a person serves as both general counsel and company secretary of a single company, it is difficult to make a precise distinction between the functions and roles of the two posts. The law requires a company to appoint a secretary, but it does not require a general counsel. Yet a general counsel acts as an independent legal adviser to a company, and legal advice given to the company receives privileged protection against disclosure.<sup>84</sup> A company secretary, however, is an officer of the company rather than an independent legal adviser and any advice given, even if legal, is not protected by the legal privilege rules. Legal privilege rules confer protection on companies against the disclosure of internal communications which would otherwise be required by third parties. A company secretary may have a duty to report to the regulator and may have to make a public interest disclosure of misconduct by the company, or an insider of the company, to the regulator while receiving protection.<sup>85</sup> Yet, the general counsel

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<sup>83</sup> Jessica Naima Dijlani 'The British importation of American corporate compliance' (2011) 76 *Brookings Law Review* 303- 341.

<sup>84</sup> *Three Rivers District Council -v- Bank of England* (No. 5) [2003] QB 1556 and *Three Rivers District Council -v- The Bank of England* (No. 6) [2005] 1 AC 610.

<sup>85</sup> The Public Interest Disclosure Act 1998.

does not have such a duty and may not make a public interest disclosure. So it is understandable why a general counsel may be appointed to hold the office of company secretary, even if not all of the advice given to the board or individual officers of the company in internal communications can be classified as legal advice. There is clearly an advantage for companies to appoint a legally qualified person to act as company secretary and, indeed, Taiwan requires that only qualified lawyers in Taiwan can act as a company secretary. Thus the office can be easily assumed by general counsel of the company. This, however, excludes other governance professionals such as auditors who can provide different set of governance skills to the companies.

### **Communication privilege against disclosure given to the company secretary**

Communication privilege against disclosure should be given to a company secretary who is not a legally qualified person in the UK in order to level the playing field. In other jurisdictions, this protection can also encourage a board to communicate with its corporate governance officer.

The corporate governance codes of the UK, Hong Kong, Singapore, and Taiwan all specify that a company secretary should be accessible to board members for advice.<sup>86</sup> If so, would advice given to individual non-executive directors on their rights and duties constitute legal advice? Such protection may encourage non-executive directors to seek the advice of general counsel or outside counsel on an issue. Based on such advice, non-executive directors can make legally informed decisions. Without such legal privilege protection, members of the board would not only be less willing to use the company secretary for internal governance advice but also less willing to share information with them.

Should privilege protection cover internal communications between a company secretary who is not legally qualified and the company, or the individual directors, in order to enhance corporate value? In all the work carried out by the company secretary of a listed company, they must put on legal spectacles<sup>87</sup> when providing their service; be it formulating governance protocols and instituting reporting systems to improve governance standards or evaluating governance strategies and best practice. They also act as a liaison between the board and management. Without such protection, officers may be discouraged from seeking advice from a non-lawyer company secretary. If such a company secretary is not used by other officers for internal advice this would reduce the company secretary's ability to give advice on governance issues. In particular, if the company secretary acts as chief of staff to the chairman and also as the executive and non-executive directors' link to the chairman, protection given to their communications would enhance greater information-sharing at that level. Such protection would level the playing-field for a company secretary without legal

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<sup>86</sup> Corporate Governance Code, B 5.2.

<sup>87</sup> This is the test that Lord Roger developed in *Three Rivers District Council -v- The Bank of England* (No. 6) [2005] 1 AC 610.

qualifications who can provide an enhanced level of governance compared with a general counsel who is normally attached to the CEO's office.

## **Conclusion**

Many common law and non-common law countries have recognised the governance value of a company secretary playing the role of corporate governance officer in listed companies. This paper has shown that soft-law based corporate governance has the potential to enhance the gatekeeping functions of the company secretary in facilitating corporate transparency through law and policy compliance. It may also enhance board independence through assisting oversight by non-executive directors. The attribute of independence of a company secretary- both independence in terms of judgment and in terms of his relationships with the company and members of the board, can benefit from a soft-law approach to regulation. Professional codes of conduct can be developed to provide situational guidance on independence. Corporate governance codes can include a regime on the appointment and removal of a company secretary – including the right of representation to the board of a removed company secretary, and on conflicts of interest that may arise when appointing a professional services firm as company secretary. More definite rules on corporate attribution in civil and criminal liabilities should be introduced to increase the utility of professional services firms in the provision of such a gatekeeping service. The UK, as the leading governance services providing country, has the potential to provide guidance. However, some amendment to the current provisions in the Companies Act 2006 should be made to avoid a confusing reading. At the transnational level, there can be governance synergies in creating joint subsidiary governance frameworks. Although company secretaries may yield synergies in providing coordinated responses to joint enforcement actions at a cross-border level, a non-legally qualified secretary can also bring a different set of skills to companies in assisting the governance programme. Giving protection to communications between the company secretary and board members can increase the ability of the company secretary to give guidance in matters of governance.